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In the Supreme Court of the United States

October Term, 1975
No. 75-517

WAYNE McARTHUR MACE,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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OPINIONS BELOW

The opinion of the Court of Common Pleas of Dauphin County (App. C. of Petition) is reported at 96 Dauph. 350 (1974). The opinion of the Superior Court of Pennsylvania (App. A. of Petition) is reported at Pa. Super. , 341 A. 2d 505 (1975). The Supreme Court of Pennsylvania's denial of a petition for allowance of appeal (App. D. of Petition) dated September 18, 1975, is as yet unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

I. Do questions of pretrial discovery in state criminal trials arise to constitutional dimension and should they be considered by this Honorable Court?

II. Was petitioner denied due process of law because he was unable to examine independently certain autopsy specimens to determine the victim's cause of death when respondent was in no way responsible for the destruction of the specimens, when respondent made available to petitioner all medical records, scientific evidence and expert witnesses in existence, when petitioner made no showing that the destroyed specimens would have provided evidence favorable to the defense, and when petitioner presented an alibi defense at trial?

III. Was petitioner placed in double jeopardy in violation of the Fifth Amendment of the U. S. Constitution when he was charged, tried and convicted of involuntary manslaughter after previously having been indicted for a different offense under an unconstitutional statute?

STATEMENT OF THE CASE

This litigation arises from the death of Mrs. Mildred Maley of Frackville, Pennsylvania, on August 18, 1971. An autopsy that was performed immediately after death by Dr. Jafar Tabatabai of Ashland General Hospital, Ashland, Pennsylvania, revealed a large bruise on the external genitalia of Mrs. Maley and a bruise inside her vagina. The autopsy also revealed a large amount of blood in the abdominal cavity that was determined to have come from an injury to the rear of the uterus. Large portions of Mrs. Maley's fallopian tubes and uterus were observed by Dr. Tabatabai as being dead prior to her demise. During the autopsy Dr. Tabatabai removed the victim's liver, kidneys, uterus and fallopian tubes for further chemical analysis. Dr. Tabatabai testified at petitioner's trial, which commenced on October 2, 1973, that in his expert opinion Mrs. Maley died as a result of shock.

The organs taken from Mrs. Maley's body were next examined by a toxicologist, Dr. Frederick Rieders, Director of the National Medical Services Laboratory in Willow Grove, Pennsylvania. This examination revealed that a concentration of potassium iodide had been injected into the vaginal area of Mrs. Maley, a concentration large enough to have caused the dilation of her capillaries which could have led to the collapse of her blood vessels which in turn could have caused shock. At petitioner's trial, Dr. Rieders testified that an injection of potassium iodide into a woman's uterus could abort a fetus but that the person administering this material would need great skill to suc-

cessfully perform the abortion without endangering the woman. Dr. Rieders also testified that potassium iodide was not in the category of substances used by the medical profession to initiate a miscarriage.

After Dr. Rieder's examination, the organs were sent to a pathologist, Dr. Robert Catherman, Deputy Medical Examiner for the City of Philadelphia. As part of his examination, Dr. Catherman removed tissues from the organs and imbedded these tissues in paraffin. He then sent the rest of the organs back to Dr. Rieders, and they were destroyed as per normal operating procedures at the National Medical Services Laboratory on January 14, 1972. At petitioner's trial, Dr. Catherman opined that Mrs. Maley died from shock that was caused by the injection of potassium iodide into her uterus.

At his trial petitioner presented evidence that at approximately 11:30 p.m. on August 15, 1971, a woman entered his residence, stated that she had just had an abortion and that she was in extreme discomfort, and that it was petitioner himself who arranged to have her taken to a hospital. Respondent countered this evidence with testimony at trial that petitioner admitted injecting potassium iodide into Mrs. Maley's uterus for the purpose of procuring an abortion and that immediately thereafter Mrs. Maley complained of severe pain and became unconscious. Respondent also presented evidence that Mrs. Maley never regained consciousness after the evening of August 15, 1971 and that she died on the morning of August 18, 1971. On October 9, 1973 petitioner was found guilty of the crime of involuntary manslaughter.

Respondent confirms that petitioner's analysis of the procedural history of the case is accurate.

ARGUMENT

I. The Disposition of Petitioner's Request for Pretrial Discovery Was Governed by the Pennsylvania Rules of Criminal Procedure, Involved No Important Question of Federal Law and Should Not Be Reviewed by This Honorable Court

The first allegation forwarded by petitioner involves the issue of pretrial discovery in criminal cases in favor of the defense. Petitioner argues that he was denied due process of law when his request for pretrial discovery, which included a demand that the defense be allowed to make an independent medical evaluation of the autopsy to determine Mildred Maley's cause of death, was not satisfactorily answered. The first response to this argument is that the request for pretrial discovery is appropriately controlled by the Pennsylvania law and that no federal questions are raised herein.

The scope of pretrial discovery varies tremendously from jurisdiction to jurisdiction in this country.[1] Moreover, the law on discovery in criminal trials is presently in a state of flux in many states. Undeniably there is a general trend towards more liberalized discovery, although several states still will not permit any discovery at all in criminal trials. The remaining states either recognize the

[1] See generally, R. Moore, Criminal Discovery, 19 Hast. L. Rev. 865 (1966), and 7 A.L.R. 3d 8 (1966).

inherent power of the courts to permit discovery or have legislation authorizing it. There are great differences among them, however, both with respect to the items subject to discovery and the conditions under which discovery will be granted.

This Honorable Court, while not hesitating to make favorable references to discovery in criminal cases in *Dennis v. U.S.*, 384 U.S. 855 (1966), has never seen fit to discourage this local diversity of procedural rules by imposing upon the states a constitutionally mandated system of criminal discovery. The reluctance of this Honorable Court to review rules governing discovery in the various jurisdictions is aptly illustrated in three recent cases. In *State v. Edgecombe,* 275 So. 2d 740 (1973), the Louisiana court ruled that a defendant charged with rape and kidnapping was not entitled to pretrial inspection of the state's evidence arising from tests made on the victim's clothing as per a local rule which made evidence which was part of the state's proof inaccessible to the defendant before trial. This Honorable Court denied a petition for a writ of certiorari following this Louisiana holding, *Edgecombe v. Louisiana,* U.S. , 94 S. Ct. 591 (1973), in the face of the petitioner's allegation that the requested discovery would have allowed him to show that the perpetrator had a blood type different than his. In *Avery v. State,* 15 Md. App. 520, 292 A. 2d 728 (1972), a doctor who was convicted of assault and battery for sexually molesting a patient was held by the state court not to have been deprived of any constitutional rights by the victim's refusal to allow inspection of her psychiatric records. This Honorable Court refused to consider the merits of this holding, denying a petition that included an allegation that

this evidence was vital to the defense. *Avery v. Maryland,* 410 U.S. 977 (1973). In *U.S. v. Augenblick,* 393 U.S. 348 (1969), a federal criminal case involving the loss of a tape containing the interrogation of a witness prior to a request for discovery, this Honorable Court considered the relationship between rules of discovery and the United States Constitution:

> "But questions of that character do not rise to a constitutional level. Indeed our *Jencks decision* and the *Jencks Act* were not cast in constitutional terms . . . They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials. It may be that in some situations denial of production of a *Jencks Act* type of statement might be a denial of a Sixth Amendment right. There is, e.g., the command of the Sixth Amendment that criminal defendants have compulsory process to obtain witnesses for their defense . . . but *certain* it is that this case is not a worthy candidate for consideration at the constitutional level." (Citations omitted.) *U.S. v. Augenblick,* supra, at 356.

The respondent respectfully submits that this issue, involving the disposition of an application for pretrial discovery of physical evidence, was properly controlled by the Pennsylvania Rules of Criminal Procedure and is not a worthy candidate for consideration at the constitutional level.

II. In No Aspect of Petitioner's Prosecution, Particularly Not in What Was Provided to Him by Way of Discovery, Was Petitioner Denied Due Process of Law

Petitioner argues that the failure of respondent to completely satisfy his application for pretrial discovery amounted to a denial of due process under the law. To support this position, petitioner calls forth the familiar rule of *Brady v. Maryland*, 373 U.S. 83 (1963), namely, that the prosecutor's suppression of evidence favorable to an accused upon request violates due process. In considering this argument, we ask this Honorable Court to consider the following factors:

1. First, the sequence:

a. The attempted abortion was performed on August 15, 1971.

b. Mrs. Maley died on August 18, 1971.

c. On August 18, 1971 an autopsy was performed.

d. On August 26, 1971 petitioner was arrested.

e. After examination by Dr. Rieders and Dr. Catherman, the removed organs were destroyed on January 14, 1972.

f. On May 25, 1972, respondent received a letter from petitioner's attorney requesting the following four areas of discovery:

1. Complete hospital records of Mildred Maley from Ashland State General Hospital including nurses' notes and all tests taken on the patient.

2. The complete toxicology report of Dr. Rieders including the tests taken and the results obtained, as well as the tests taken by the forensic pathologist to whom Dr. Rieders submitted the genital organs of Mrs. Maley.

3. The complete report of Dr. Tabatabai including the test taken and the results obtained.

4. The names of all witnesses that the Commonwealth planned to call including but not limited to expert medical witnesses.

At no time in the May 25th letter was there any mention of the autopsy samples used to make the tests.

g. On August 14, 1973, nearly two years after the arrest date, respondent received official notification that petitioner wished the actual organ samples used in the tests of the three doctors.

h. On September 20, 1973, a hearing was held on petitioner's motion for discovery. At that time Dr. Craig Duncan testified for petitioner and stated that he needed the following things to make an adequate analysis of Mrs. Maley's cause of death:

1. The hospital charts.
2. The toxicology report of Dr. Rieders.
3. The autopsy report of Dr. Tabatabai.
4. The conclusory report of Dr. Catherman.
5. Formal and fixed tissues from which slides were made *or* paraffin imbedded slides from either Dr. Tabatabai or Dr. Catherman.
6. An interview with Dr. Rieders.

All these requirements, except the formal tissues which had been destroyed over a year and a half before, were readily made available to petitioner by respondent. Significantly, the paraffin slides, asked as an alternative to the actual organs by petitioner's expert, were available and were examined by petitioner.

i. Petitioner's trial commenced on October 2, 1973, and on October 9, 1973, petitioner was found guilty of the crime of involuntary manslaughter.

2. Petitioner has never demonstrated that the materials sought and not provided were in any way relevant to a successful defense; that is, there is no indication whatever that the destroyed organs would have amounted to "favorable evidence to the accused", a requisite to relief under the *Brady* rule.

3. The organs were destroyed as per standard laboratory procedure and no law enforcement official sanctioned or participated in the destruction. Indeed, the trial court made a finding of fact that respondent acted in good faith at all times and "in absence of bad faith or connivance on the part of the government, destruction of evidence prior to trial does not necessitate reversal of a conviction." *U.S. v. Henry,* 487 F. 2d 912 (9 Cir. 1973).

4. Petitioner presented an alibi defense at trial. He contended that he was not the person who injected the potassium iodide into Mildred Maley's uterus. Petitioner never contested the finding that the injection of potassium iodide caused Mrs. Maley's death.

These factors clearly illustrate that petitioner's alleged deprivation falls far short of meeting the *Brady* standard requisite for constitutional relief. First, the prosecution suppressed no evidence; second, there was no showing that the destroyed organs would have been of value to petitioner; third, petitioner's request for the organs was belated and in the alternative; and fourth, the failure to preserve the organs clearly did petitioner no harm. In sum, petitioner suffered no denial of due process of law.

III. Petitioner Was Not Placed in Double Jeopardy in Violation of the Fifth Amendment of the United States Constitution When He Was Charged, Tried and Convicted of Involuntary Manslaughter

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Petitioner was initially arrested and indicted in Dauphin County, Pennsylvania pursuant to the provisions of the former Pennsylvania statute entitled "Abortion Causing Death", Act of June 24, 1939, P.L. 872, §719, 18 P.S. §4719. After indictment petitioner and respondent mutually agreed to forego further prosecution of this charge until the Pennsylvania Supreme Court ruled on the constitutionality of the "Abortion Causing Death" statute. On March 29, 1973, the Pennsylvania Supreme Court, in the case of *Commonwealth v. Page,* 451 Pa. 331, 303 A. 2d 215 (1973), made the anticipated ruling and held that the statute was unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment because its provi-

sions failed to comport with the permissible scope of state regulation of abortion.

Subsequent to this declaration the Commonwealth of Pennsylvania, through the Dauphin County District Attorney, charged petitioner with involuntary manslaughter for which he was tried and convicted in October, 1973. Petitioner contends that, even though he was never brought to trial on the first offense, "Abortion Causing Death", the mere *charging* him with the two offenses infringed his constitutional protection against double jeopardy and his conviction was therefore illegal. This contention finds support in neither federal nor Pennsylvania law.

There is no doubt but that, if prosecution is terminated prior to verdict, reprosecution will be prohibited if the defendant has been so exposed to the possibility of conviction that jeopardy must be held to attach. *Downum v. U.S.*, 372 U.S. 734 (1965); *U.S. v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). Quite obviously, courts have found it necessary to define a point in criminal proceedings at which time there is "attachment of jeopardy". In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. *Illinois v. Somerville*, 410 U.S. 458 (1973). In a nonjury trial, jeopardy attaches when the court begins to hear evidence. *Wade v. Hunter*, 336 U.S. 684 (1949). This Honorable Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of facts, whether the trier be a jury or a judge". *United States v. Jorn*, 400 U.S. 470, 479 (1971). See *Kepner v. United States*, 195 U.S. 100, 128, 130, 131 (1904); *United States v. McDonald*, 207 U.S. 120, 127 (1907); *Collins v. Loisel*, 262 U.S. 426, 429 (1923); and most recently, *Serfass v. United States*, U.S. , 95 S. Ct. 1055, 1062-1065 (1975). Clearly, under this authority, petitioner had not yet been put in jeopardy when he was reindicted for involuntary manslaughter after the Pennsylvania "Abortion Causing Death" statute had been found unconstitutional. He had not yet been "put to trial before the trier of facts".

This Honorable Court has recently stated that:

> "It is true that we have disparaged 'rigid mechanical' rules in the interpretation of the Double Jeopardy Clause. Illinois v. Somerville, 410 U.S. 458, 467, 93 S. Ct. 1066, 1072 (1973). However, we also observed in that case that 'the conclusion that jeopardy attached begins rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.' Ibid. Cf. United States v. Sisson, 399 U.S. 267, 303, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1971). Implicit in the latter statement is the premise that the 'constitutional policies underpinning the Fifth Amendment guarantee' are not implicated before that point at which 'jeopardy attaches.' United States v. Jorn, 400 U.S. 470, 480, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543 (1971). As we have noted above, the Court has consistently adhered to the view that jeopardy does not attach until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.' Id., at 479, 91 S. Ct. at 554. This is by no means a 'rigid, mechanical' rule. It is, of course, like most legal rules, an attempt to impart content to an abstraction." *Serfass v. United States*, supra, at 1064.

Recent cases have given further meaning to this abstraction. In *Illinois v. Somerville*, supra, this Honorable Court ruled that the declaration of a mistrial over the defendant's objection, because the trial court concluded that the indictment was insufficient to charge a crime, does not prevent a state from subsequently trying a defendant under a valid indictment. In *Serfass v. United States*, supra, this Honorable Court ruled that jeopardy had not attached when the District Court dismissed defendant's indictment because the prosecution based upon the dismissed indictment had been terminated prior to trial and without risk to the defendant of determination of guilt. It is difficult to see how petitioner can anticipate relief under the double jeopardy clause in face of this authority.

Petitioner places reliance on the case of *Commonwealth v. Campana*, 452 Pa. 233, 304 A. 2d 432 (1973), a case in which the Pennsylvania Supreme Court held, inter alia, that all known charges against a defendant arising from the same "criminal episode" must be tried at one time. The Pennsylvania Court originally based its decision on "constitutional grounds". An appeal of this decision was taken to this Honorable Court where the case was remanded back to Pennsylvania for a determination as to whether it was based on state or federal constitutional grounds. *Pennsylvania v. Campana*, 414 U.S. 808 (1973). On remand, *Commonwealth v. Campana*, 455 Pa. 622, 314 A. 2d 854 (1974), the Pennsylvania Supreme Court seemed to reverse its position and hold that its decision was based on its supervisory powers and not on the United States Constitution. This is extremely important in Pennsylvania because the *Campana* ruling will not be given retroactive effect and it does not apply to cases where the

charge or charges took place before the case was decided. *Commonwealth v. Hynd*, 230 Pa. Superior Ct. 114, 326 A. 2d 433 (1974).

Petitioner concedes that the *Campana* rule does not affect his conviction under the Pennsylvania interpretation. *Even if*, arguendo, the *Campana* rule *did* have application to the instant case, and even if this petition is considered in light of Justice Douglas' following words in his concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 454 (1970):

> "In my view the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at *one trial* all the charges against a defendant that grew out of a single criminal act, occurrence, episode, or transaction. This 'same transaction' test of 'same offense' not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in *one lawsuit* of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." (Emphasis added.)

no relief would be forthcoming to petitioner. The *Campana* ruling and the words of Justice Douglas require only that all charges resulting from the criminal episode be consolidated at one trial. There is no prohibition against more than one indictment being issued so long as all charges arising from the same criminal transaction are tried together. Petitioner has never maintained that he was forced to go through more than one trial.

Briefly, we emphasize the purposes of and the policies which animate the Double Jeopardy Clause in this context:

> ". . . the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957).

The most cursory examination of the facts that surround petitioner's conviction makes it clear that petitioner has not been victimized by any of the practices that the Clause was designed to prohibit.

Lastly, we respond to the petitioner's allegation that he presents a novel question that is of considerable importance to this Honorable Court. We respectfully dissent from this assessment. No principle is more fundamental or better documented than the principle that an accused must suffer jeopardy before he can suffer double jeopardy. Petitioner's case fits squarely within this rule. Petitioner was never placed in jeopardy prior to his trial in which he was found guilty of the crime of involuntary manslaughter. This fact bars his way to relief under the Double Jeopardy Clause.

CONCLUSION

A writ of certiorari should not issue because petitioner has not disclosed any matter or cause calling for review by this Honorable Court. The first issue raised by petitioner, concerning pretrial discovery, is a purely local matter appropriately disposed of by the Pennsylvania Courts and it is evident from the circumstances of this case that this disposition did not amount to a denial of due process. Petitioner's second issue, that his conviction violated the Double Jeopardy Clause, is equally without merit because an accused must suffer jeopardy before he can suffer double jeopardy, a prerequisite absent from the facts of this case. As the petition is barren of important legal questions cognizable by this Honorable Court, the petition should be denied.

Respectfully submitted,

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